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UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

IN THE MATTER OF THE
 EXTRADITION OF DANE EDWARD
 ROSSMAN

NO. 13-10092M-DTF
 MEMORANDUM OF LAW
 REGARDING EXTRADITION

The government, by and through its attorneys, John S. Leonardo, United States Attorney for the District of Arizona, and Ryan P. DeJoe, Assistant U.S. Attorney, acting on behalf of the Canadian government, hereby submits the following Memorandum of Law Regarding Extradition. The extradition hearing is currently set for Wednesday, April 17, 2010, at 11:00 a.m.

The fugitive, Dane Rossman, ("Rossman"), was arrested on February 20, 2013, pursuant to a complaint and warrant issued by U.S. Magistrate Judge Jacqueline Rateau, seeking the his extradition to Canada pursuant to an extradition treaty between Canada and the United States, 27 UST 983, TIAS 8237 (hereinafter, "the Treaty"), and pursuant to 18 U.S.C. 3184 *et seq.* Magistrate Judge Rateau signed the warrant for arrest for extradition on February 19, 2013. This Court ordered the defendant be detained pending the extradition hearing. The fugitive is currently in the custody of the United States Marshal Service.

1 Authorities in Canada seek the extradition of Rossman to answer the following
2 charges under the Criminal Code of Canada (CCC):

3 (1) Mischief - CCC § 430(3)

4 (2) Mischief Endangering Life - CCC § 430(2)

5 (3) Disguise with the Intent to Commit an Indictable Offense - CCC § 351(2)

6 Article 2 of the Treaty provides for the extradition of persons accused or convicted
7 of these crimes. The Court of the Province of Ontario in Canada had issued a warrant for
8 Rossman's arrest on December 20, 2010 for this purpose.

9 The Government of Canada timely submitted a formal request for surrender of
10 Rossman, supported by appropriate documents, to the Department of State, who provided
11 them to the Department of Justice's Office of International Affairs. That office forwarded
12 original documents to undersigned counsel, who will deliver them to this Court's chambers.
13 The following is a description of the original documents:

14 1) Diplomatic Notes No. 0232 and 0240 (Referral of Extradition Request), bound
15 with a gold ribbon and gold seal, dated November 14, 2012, to United States Secretary of
16 State John F. Kerry from Canada, bearing the Declaration of Alexis Blane, Attorney Adviser
17 in the Office of Legal Adviser for the Department of State, as well as her signature and that
18 of the Secretary of State, dated February 14, 2013. Diplomatic Note No. 0232 sets forth that
19 the Rossman's offenses are extraditable under the Treaty, which is in full force and effect.
20 (Declaration, p. 2.) The Extradition Request also describes Rossman's personal data as well
21 as that the offenses took place during the G-20 Economic Summit in Toronto, Ontario,
22 Canada in June, 2010. Directly under the Declaration is a copy of the Treaty.

23 2) The Extradition Request, dated November 14, 2012, bound and bearing red ribbons
24 and seal, with the signature on the first page of Sylvia D. Johnson, Consul General, certifying
25 the documents. Following that is a Certificate of Authentication, bearing red ribbons and
26 seal, from Cathy Chalifour, Counsel for the International Assistance Group, Department of

1 Justice of Canada, certifying that the affidavits prepared by Roger Shallow, Counsel with the
2 Ministry of the Attorney General of Ontario, prepared on October 31, 2012, and Peter
3 Trimble, Detective Constable with the Toronto Police, prepared on October 29, 2012, are true
4 copies and that the accompanying signatures are by individuals with the proper authority to
5 attest to the affidavits.

6 3) An 11-page Affidavit of Roger Swallow, Counsel with the Ministry of the Attorney
7 General, Ontario, Canada, describing the Canadian prosecutorial structure and the process
8 undertaken to ensure safety and to investigate any crimes during the G-20 summit in Toronto
9 (pp 1-3); Canada's criminal code and criminal process (pp 3-4); and the facts supporting the
10 allegations against Rossman and applicable sections of the CCC (pp 5-11).

11 4) A 116-page Affidavit of Peter Trimble, a police officer with the Toronto Police
12 Service. The affidavit outlines Rossman's alleged violations, on June 26, 2010, which stem
13 from himself and Joel Bitar, wearing masks over their faces, throwing a sign through a
14 Starbucks window thereby damaging property and endangering the safety of patrons inside
15 the establishment. The affidavit includes photographic evidence, expert identification
16 analysis, border crossing history, and documents surrounding Rossman's arrest for breach
17 of the peace in Toronto on June 27, 2010, in support of the charges.

18 The Office of International Affairs (OIA) transmitted these original documents to the
19 District of Arizona. On February 25, 2013, copies were given to Rossman's assigned counsel
20 for the extradition, Ryan Moore.

21 The government waited to file this memorandum because of the pending bail motion
22 and the possibility Rossman would waive extradition. However, the government has heard
23 from defense counsel that Rossman will not be waiving extradition to Canada. By statute,
24 this Court must hold an extradition hearing to consider the documentation provided by
25 Canada and determine whether "it is sufficient to sustain the charge under the provisions of
26 the proper treaty or convention." 18 U.S.C. § 3184. *See also Vo v. Benov*, 447 F.3d 1235,

1237-38 (9th Cir. 2006) (generally explaining process). In so doing, this Court determines primarily whether there was “probable cause to believe” he committed the offense. *Barapind v. Enomoto*, 400 F.3d 744, 747, 749 (9th Cir. 2005) (en banc). Because the law regulating extradition differs from ordinary criminal or civil proceedings, this memorandum provides information about the nature of the hearing and the relevant issues.

6 I. Nature of the Extradition Hearing

7 A. Purpose of Hearing

8 The purpose of an extradition hearing required by 18 U.S.C. § 3184 is to determine
9 whether the person arrested pursuant to a complaint in the United States on behalf of a
10 foreign government is subject to surrender to the requesting country under the terms of the
11 pertinent treaty and relevant law. If this Court finds the fugitive extraditable, it certifies that
12 conclusion to the Secretary of State, who decides whether to surrender him. This Court
13 incorporates its factual findings and conclusions of law in a “certification of extraditability,”
14 which is forwarded to the Department of State for disposition by the Secretary of State. The
15 Secretary ultimately decides whether to surrender the fugitive. *See also Vo*, 447 F.3d at
16 1237.

17 Further, an extradition proceeding is not a criminal case. *See Kamrin v. United States*,
18 725 F.2d 1225, 1227-1228 (9th Cir. 1984); *Martin v. Warden, Atlanta Penitentiary*, 993 F.2d
19 824, 829 (11th Cir. 1993). Similarly, neither the Federal Rules of Criminal Procedure or the
20 Federal Rules of Evidence apply to international extradition proceedings. Fed R. Crim. P.
21 1(a)(5)(A); Fed. R. Evid. 1101 (d)(3); *See also, Afanesjev v. Hurlburt*, 418 F.3d 1159,
22 1164-65 (11th Cir. 2005); *Melia v. United States*, 667 F.2d 300, 302 (2nd Cir. 1981); *Bovio*
23 *v. United States*, 989 F.2d 255, 259 n.3 (7th Cir. 1993).

24 B. Elements Necessary for Extradition

25 A determination of extraditability is proper if: (1) the judicial officer was authorized
26 to conduct extradition proceedings; (2) the court had jurisdiction over the fugitive; (3) the

1 applicable treaty was in full force and effect; (4) the crimes for which surrender was
 2 requested were covered by the applicable treaty; and (5) there was competent legal evidence
 3 to demonstrate probable cause that the fugitive committed the crime charged, including that
 4 the person before the court is the one accused of the crime. *See Zanazanian v. United States*,
 5 729 F.2d 624, 625-26 (9th Cir. 1984); *Gusikoff v. United States*, 620 F.2d 459, 462 (5th Cir.
 6 1980); *Ornelas v. Ruiz*, 161 U.S. 502 (1896); *Bingham v. Bradley*, 241 U.S. 511 (1916);
 7 *McNamara v. Henkel*, 226 U.S. 520 (1913); *United States v. Barr*, 619 F.Supp. 1068, 1070
 8 (E.D.Pa. 1985).

9 1. *Authority of the judicial officer.*

10 The extradition statute, 18 U.S.C. § 3184, authorizes a broad class of judicial officers
 11 to hear extradition cases. Federal judges are clearly authorized by the statute to hear and
 12 decide extradition cases and the statute provides that magistrates may do so if permitted by
 13 the rules of their court. *See Ward v. Rutherford*, 921 F.2d 286 (D.C. Cir. 1990) (rejecting
 14 constitutional challenge to magistrate's authority). In the District of Arizona, the Local Rules
 15 of Practice for U.S. District Court provide that "full time magistrate judges in the district of
 16 Arizona shall perform the following duties . . . (15) Conduct extradition proceedings in
 17 accordance with 18 U.S.C. § 3184." L.R.Crim. 57.6 (d)(15). Thus, magistrate judges in this
 18 Court have authority to hear extradition matters.

19 2. *Jurisdiction over the fugitive.*

20 Although the Supreme Court included personal jurisdiction as an essential element
 21 for reasons of analytic completeness, the question of jurisdiction has not been a decisive issue
 22 in extradition cases in modern times. If the fugitive is before the court, the court has personal
 23 jurisdiction. *See In re Pazienza*, 619 F.Supp. 611 (S.D.N.Y. 1985). Thus, this Court has
 24 jurisdiction over Rossman in this case.

1 3. *Treaty in full force and effect.*

2 The extradition statute, 18 U.S.C. § 3184, limits extradition to instances in which a
3 treaty is in force between the requesting state and the requested state. *See, e.g., Argento v.*
4 *Horn*, 241 F.2d 258 (6th Cir. 1957). As part of its proof in this case, the government has
5 provided a declaration from an attorney in the Office of the Legal Adviser of the Department
6 of State attesting that the U.S./Canada Treaty is in full force and effect. (*See Declaration of*
7 *Alexis Blane.*) The Department of State’s opinion on this issue is entitled to deference.
8 *Galanis v. Pallanck*, 568 F.2d 234 (2nd Cir. 1977); *Sayne v. Shipley*, 418 F.2d 679 (5th Cir.
9 1969). Thus, the Treaty is in full force and effect.

10 4. *Crime in the requesting state covered by Treaty.*

11 The Treaty provides for the return of fugitives charged with or convicted of a crime
12 in the state requesting extradition. The charges against the fugitive are pending in Canada,
13 specifically, the Province of Ontario. The defendant has been charged with three offenses.

14 Dual criminality (that the conduct at issue be a crime in both the requesting and
15 requested countries) is not required *per se* for extradition; it need be found only if the treaty
16 so requires. *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *In re Assarsson*, 635 F.2d 1237
17 (7th Cir. 1980). In this case, dual criminality is required by Article 2(1) of the Treaty.
18 Article 2(1) of the Treaty provides that extradition shall be granted for conduct which
19 constitutes an offense punishable by the laws of both Canada and the United States by
20 imprisonment for a term exceeding one year. (*See Declaration of Alexis Blane*, p.2).

21 A requesting country is not obliged to produce evidence on all elements of a criminal
22 offense nor is it required to establish that its crimes are identical to the crimes of the
23 requested country. *Kelly v. Griffin*, 241 U.S. 6, 15 (1916). “The primary focus of dual
24 criminality requires has always been on the conduct charged; the elements of the analogous
25 offenses need not be identical.” *Clarey v. Gregg*, 138 F.3d 764, 766 (9th Cir. 1998). “When
26 the laws of both the requesting and the requested party appear to be directed to the same

1 basic evil, the statutes are substantially analogous, and can form the basis of dual
 2 criminality.” *Id.* (internal citations and quotations omitted) *see also In re Russell*, 789 F.2d
 3 801, 803 (9th Cir.1986) (upholding extradition for conspiracy even though overt act was not
 4 required in requesting nation because request alleged several overt acts). The Supreme Court
 5 has stated:

6 The law does not require that the name by which the crime is described in the
 7 two countries shall be the same; nor that the scope of liability shall be coex-
 8 tensive, or, in other respects, the same in the two countries. It is enough if the
 9 particular act charged is criminal in both jurisdictions.

10 *Collins v. Loisel*, 259 U.S. 309, 312 (1922). *See also Cucuzzella v. Keliikoa*, 638 F.2d 105,
 11 108 (9th Cir. 1981); *Man-Seok Choe v. Torres*, 525 F.3d 733, 737 (9th Cir. 2008); *Messina*
 12 *v. United States*, 728 F.2d 77 (2nd Cir. 1984); *United States v. Stockinger*, 269 F.2d 681, 687
 13 (2nd Cir. 1959); *Di Stefano v. Moore*, 46 F.2d 308 (E.D.N.Y.), *aff’d*, 46 F. 2d 310 (2nd Cir.
 14 1930). In comparing the foreign offense with United States law to decide the question of
 15 dual criminality, the magistrate may consider federal law, the law of the state in which the
 16 hearing is held, and the law of a preponderance of the states. *Cucuzzella*, 638 F.2d at 107.
 17 The court’s analysis should “approach challenges to extradition with a view toward finding
 18 the offense within the treaty.” *McElvy v. Civiletti*, 523 F. Supp. 42, 48 (S.D.Fla. 1981).

19 Here, the fugitive has been charged in Canada with three offenses:

20 (1) Mischief - CCC § 430(3)

21 (2) Mischief Endangering Life - CCC § 430(2)

22 (3) Disguise with the Intent to Commit an Indictable Offense - CCC § 351(2)

23 Dual criminality exists for the mischief offenses. Mischief, in general, is defined under CCC
 24 § 430:

25 Every one commits mischief who willfully:

26 (a) destroys or damages property;

 (b) renders property dangerous, useless, inoperative or ineffective;

 (c) obstructs, interrupts or interferes with the lawful use, enjoyment or
 operation of property; or

1 (d) obstructs, interrupts or interferes with any person in the lawful use,
2 enjoyment or operation of property

3 (See Affidavit of Roger Shallow, p. 7.)

4 Schedule Item 24 lists “willful injury to property” as an offense requiring extradition
5 pursuant to Article 2(1) if the penalties for the prohibited conduct are punishable by both
6 countries by a term of imprisonment exceeding one year. Under CCC § 430, subsection (3)
7 states that committing mischief to property exceeding \$5,000 in value is subject to 10 years
8 imprisonment. Subsection (2) states that committing mischief that causes actual danger to
9 life is subject to life imprisonment. (*Id.*)

10 The Arizona Revised Statutes contains substantially analogous statutes that are
11 punishable by over one year. CCC § 430(3) is equivalent to A.R.S. § 13-1602(A)(1) and
12 (B)(3) provides a class 5 felony, which carries two years imprisonment as a potential penalty,
13 for criminal damaging by defacing or damaging property of another person or tampering with
14 property of another person so as substantially to impair its function or value if the damage
15 is between \$2,000 and \$10,000. CCC § 430(2) is comparable to A.R.S. § 13-1201(A) which
16 states a person commits endangerment by recklessly endangering another person with a
17 substantial risk of imminent death or physical injury. Endangerment involving a substantial
18 risk of imminent death is a class 6 felony, punishable up to one and one-half years
19 imprisonment. The government concedes that Disguise with the Intent to Commit an
20 Indictable Offense has no substantially analogous federal or Arizona state statute and is not
21 a covered under the schedule of offenses attached to the treaty.

22 These statutes proscribe the same type of criminal conduct as the Canadian offenses.
23 Therefore, they criminalize similar conduct even if every element is not mirrored. Dual
24 criminality exists for the mischief charges in the Canadian request.
25
26

1 5. *Competent legal evidence demonstrating probable cause.*

2 The level of proof for extradition is the familiar domestic criminal law requirement
3 of “probable cause” to believe the defendant committed the crime alleged. *Zanazanian*, 729
4 F.2d at 624 (“The evidence must demonstrate probable cause to believe that the accused
5 committed the crime charged.”) (citing *Merino v. U.S. Marshal*, 326 F.2d 5, 11-12 (9th Cir.
6 1963)); *see also Sindona v. Grant*, 619 F.2d 167 (2nd Cir. 1980) (standard of proof in
7 extradition proceedings is that of probable cause as defined in federal law). Probable cause
8 requires sufficient evidence to cause a person of ordinary prudence and caution to
9 conscientiously entertain a reasonable belief in the guilt of the accused. *Coleman v. Burnett*,
10 477 F.2d 1187, 1202 (D.C. Cir. 1973).

11 “The function of the committing magistrate is to determine whether there is competent
12 evidence to justify holding the accused to await trial, and not to determine whether evidence
13 is sufficient to justify a conviction.” *Collins*, 259 U.S. at 316; *see also* Article 3 of the Treaty
14 (“Extradition shall be granted only if the evidence be found sufficient, according to the laws
15 of the requested Party, . . . to justify the committal for trial of the person sought if the offense
16 of which he has been accused had been committed in that place . . .”) Accordingly, “the
17 country seeking extradition is not required to produce all its evidence at an extradition
18 hearing and it is not [this Court’s] role to determine whether there is sufficient evidence to
19 convict the accused. The magistrate does not weigh conflicting evidence and make factual
20 determinations but, rather, determines only whether there is competent evidence to support
21 the belief that the accused has committed the charged offense.” *Quinn v. Robinson*, 783 F.2d
22 776, 815 (9th Cir. 1986) (citation omitted).

23 The extradition hearing is not a trial, but simply an inquiry into probable cause. “An
24 extradition hearing is not the occasion for an adjudication of guilt or innocence.” *Messina*
25 *v. United States*, 728 F.2d 77, 80 (2nd Cir. 1984), as cited in *Ward v. Rutherford*, 921 F.2d
26 286, 287 (D.C. Cir. 1990). Rather, as stated above, the proceeding is essentially a

1 “preliminary examination to determine whether a case is made out which will justify the
2 holding of the accused and his surrender to the demanding nation.” *United States v. Kember*,
3 685 F.2d 451, 455 (D.C. Cir. 1982), as cited in *Ward v. Rutherford*, 921 F.2d at 287. “A
4 magistrate presiding over the hearing thus performs an assignment in line with his or her
5 accustomed task of determining if there is probable cause to hold a defendant to answer for
6 the commission of an offense. *See* Fed. R. Crim. P. 5.1 (preliminary examination by federal
7 magistrate).” *Ward v. Rutherford*, 921 F.2d at 287. *See also* *Fernandez v. Phillips*, 268 U.S.
8 311, 312 (1925); *United States ex rel. Sakaguchi v. Kaulukukui*, 520 F.2d 726, 730-31 (9th
9 Cir. 1975) (magistrate’s function is to determine whether there is “any” evidence establishing
10 reasonable or probable cause); *Sainez v. Venables*, 588 F.3d 713, 717-18 (9th Cir. 2009);
11 *Merino*, 326 F.2d at 11.

12 As discussed later in this memorandum, the rules of evidence are inapplicable,
13 unsworn hearsay is admissible, and this Court’s probable cause determination may be based
14 on documentary evidence alone.

15 There is probable cause to believe Rossman committed the charged offenses. He,
16 along with Joel Bitar, threw a sign through the window of the Starbucks at 450 Yonge St. in
17 Toronto, Ontario, Canada on June 26, 2010. Rossman was correctly identified as the person
18 who committed the offense specified in the Canadian extradition request. (*See* Affidavit of
19 Peter Trimble, pp. 1-9; Exhibit C, Affidavit of William McGarry, pp. 1-64). Mr. McGarry
20 has an extensive background in image comparison. There were photographs and video still
21 frame shots taken of the crime being committed. Mr. McGarry compared those photographs
22 to numerous photographs of Rossman, including his booking photo after being arrested in
23 Toronto the next day. (*Id.* at 59-63). Mr. McGarry also noted several specific comparisons
24 of Rossman’s clothing and other attire that aided his identification. (*Id.*) Mr. McGarry
25 concluded that Rossman threw the sign through the window of the Starbucks on June 26,
26 2010. (*Id.* at 64).

1 Other evidence also demonstrates that Rossman was in Toronto for the G-20 summit.
2 His crossing history shows he entered Canada on June 24, 2010, through the Peace Bridge
3 in Buffalo, New York. (Affidavit of Peter Trimble, Exhibit D). He exited Canada through
4 the Rainbow Bridge in Niagara Falls, New York on June 28, 2010. (*Id.*, Exhibit E). He was
5 arrested for breach of the peace in Toronto on June 27, 2010, one day after the alleged
6 incident at Starbucks. (*Id.*, Exhibit F). He identified himself as Dane Rossman for that arrest
7 and his photograph was taken and used to compare to other images taken in Toronto and
8 specifically of the alleged incident.

9 In short, the comprehensive information in the extradition documentation provided
10 by Canada, along with identity evidence, provides probable cause to believe Rossman
11 committed the offense alleged by Canada in its request.

12 C. Role of the Judicial Officer

13 “An extradition court – in this case the magistrate judge – exercises very limited
14 authority in the overall process of extradition. As we have explained, extradition is a matter
15 of foreign policy entirely within the discretion of the executive branch, except to the extent
16 that the statute interposes a judicial function.” *Vo*, 447 F.3d at 1237 (internal quotations
17 omitted), citing *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir.1997). This Court
18 considers the evidence presented on behalf of the requesting state, here Canada, and
19 determines whether there is probable cause to believe the defendant committed the offense
20 alleged, and whether the other required elements (jurisdiction, etc.) have been proven. “If
21 the judicial officer determines that there is probable cause, [that officer] *is required to certify*
22 the individual as extraditable to the Secretary of State.” *Vo*, 447 F.3d at 1237 (emphasis in
23 original).

24 This Court makes written findings of fact and conclusions of law, including separate
25 findings for each offense as to which extradition is sought. *Shapiro v. Ferrandina*, 478 F.2d
26 894 (2nd Cir. 1973) (separate findings). Factual determinations would be reviewed for clear

error. *See Mainero v. Gregg*, 164 F.3d 1199, 1205 (9th Cir. 1999) (“Factual determinations by a ... judge in an extradition proceeding are reviewed for clear error.”). This is generally called a Certification of Extraditability.¹

“After an extradition magistrate certifies that an individual can be extradited, it is the Secretary of State, representing the executive branch, who ultimately decides whether to surrender the fugitive to the requesting country. The authority of a magistrate judge serving as an extradition judicial officer is thus limited to determining an individual's eligibility to be extradited, which he does by ascertaining whether a crime is an extraditable offense under the relevant treaty and whether probable cause exists to sustain the charge.” *Vo*, 447 F.3d at 1237. If the fugitive is determined to be extraditable, he or she is committed to the custody of the United States Marshal to await the determination by the Secretary of State and transfer to the representatives of the requesting state. This Court’s Certification of Extraditability is provided to the Secretary of State together with a copy of any evidence presented on behalf of the fugitive. 18 U.S.C. § 3184.

II. Distinctive Features of the Law of Extradition

A. Extradition Hearing Not a Criminal Proceeding

An extradition hearing is not a criminal proceeding; its purpose is merely to decide probable cause, not guilt or innocence. *Neely v. Henkel*, 180 U.S. 109 (1901); *Benson v. McMahon*, 127 U.S. 457, 463 (1888); *Simmons v. Braun*, 627 F.2d 635 (2nd Cir. 1980). Thus, the person whose extradition is sought is not entitled to the rights available in a criminal trial at common law. *Charlton v. Kelly*, 229 U.S. 447, 461 (1931); *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911); *United States v. Stockinger*, 269 F.2d 681, 687 (2nd Cir. 1959). For example, a fugitive has no right to discovery or even to cross-examination if any

¹ If this Court at the extradition hearing finds probable cause to extradite, then the government will submit a proposed Certification of Extraditability after the hearing, for this Court’s approval and signature.

witnesses testify at the hearing and his or her right to present evidence is severely limited. *Messina v. United States*, 728 F.2d 77 (2nd Cir. 1984). In addition, the Sixth Amendment's guarantee to a speedy trial, limited by its terms to criminal prosecutions, does not pertain to extradition proceedings. *Jhirad v. Ferrandina*, 536 F.2d 478, 485 n.9 (2d Cir. 1976).

B. Federal Rules of Criminal Procedure and Evidence Do Not Apply

The Federal Rules of Criminal Procedure do not apply to extradition proceedings. Fed.R.Crim.P. 54(b)(5) provides that "[t]hese rules are not applicable to extradition and rendition of fugitives." The Federal Rules of Evidence are also inapplicable. Fed.R. Evid. 1101(d)(3) provides that "[t]he rules (other than with respect to privileges) do not apply . . . [to p]roceedings for extradition or rendition." *See also Merino*, 326 F.2d at 12; *Simmons v. Braun*, 627 F.2d 635, 636-37 (2nd Cir. 1980) (declining to apply the exclusionary rule and discussing differences between extradition hearings and criminal proceedings).

Rather than following standard rules, "[u]nique rules of wide latitude govern reception of evidence in Section 3184 hearings." *Sayne*, 418 F.2d at 685 (citation omitted). Among these unique rules at extradition proceedings are the following rules regarding admissibility and sufficiency of hearsay and documentary evidence.

Hearsay evidence is admissible at extradition hearings and may support a finding of extraditability, as the Ninth Circuit has noted. *Zanazanian*, 729 F.2d at 626; *see also Collins*, 259 U.S. at 317; *O'Brien v. Rozman*, 554 F.2d 780, 783 (6th Cir. 1977); *In re David*, 395 F.Supp. 803, 806 (E.D. Ill. 1975); *United States ex rel. Eatessami v. Marasco*, 275 F. Supp. 492, 494 (S.D.N.Y. 1967). The evidence need not be made under oath, and "unsworn statements of absent witnesses may be acted upon by the committing magistrate, although they could not have been received by him under the law of the state on preliminary examination." *Zanazanian*, 729 F.2d at 626.

This Court may make the determination of extraditability solely based on the documentary evidence presented. Indeed, apart from testimony concerning identity,

1 *Fernandez v. Phillips*, 268 U.S. 311 (1924) (testimony concerning identity admissible at
 2 extradition hearing), extradition treaties do not appear to contemplate the introduction of
 3 testimony of live witnesses at extradition proceedings because to do so “would defeat the
 4 whole object of the treaty.” *Bingham*, 241 U.S. at 517. Thus, a finding of extraditability
 5 may be based entirely on documentary evidence. *Shapiro v. Ferrandina*, *supra*, 478 F.2d
 6 at 902-03; *O'Brien v. Rozman*, *supra*, 554 F.2d at 783; *In re Edmonson*, 352 F. Supp. 22, 24
 7 (D. Minn. 1972).

8 “With regard to the admissibility of evidence, the general United States extradition
 9 law requires only that the evidence submitted be properly authenticated.” *Emami v. U.S.*
 10 *District Court*, 834 F.2d 1444, 1451 (9th Cir. 1987) (as quoted in *Barapind*, 400 F.3d at
 11 748). The authentication requirements for foreign documentary evidence are contained in
 12 18 U.S.C. § 3190, which specifies that “the certificate of the principal diplomatic or consular
 13 officer of the United States resident in such foreign country shall be proof that [submitted
 14 documents] are authenticated in the manner required.” *Barapind*, 400 F.3d at 748; *see also*
 15 *Cucuzzella v. Keliikoa*, 638 F.2d 105 (9th Cir. 1981) (18 U.S.C. § 3190 governs the
 16 admissibility of statements submitted by the requesting state and is satisfied by a certification
 17 that accords with the terms of the statute); *Collins v. Loisel*, *supra*. *See also* Treaty, Article
 18 10, Section (2) (discussing admissibility of extradition documents). Here, the proper
 19 certifications have been provided.

20 C. Limitations on Fugitive's Evidence

21 Because this extradition proceeding is solely to determine whether probable cause
 22 exists, the fugitive may not turn the extradition hearing into a trial. “[A] fugitive facing
 23 extradition can present his own evidence to explain away the requesting government’s
 24 evidence of probable cause.” *Barapind*, 400 F.3d at 749. However, the fugitive’s evidence
 25 must rise to the level of completely “obliterating” probable cause to be admissible and defeat
 26 extradition. It cannot merely contradict, nor can the fugitive raise a defense. *Id.*, citing

1 *Singh*, 170 F.Supp.2d at 994; *see also Mainero v. Gregg*, 164 F.3d 1199, 1205, 1207 n. 7 (9th
 2 Cir. 1999) (“Generally, evidence that explains away or completely obliterates probable cause
 3 is the only evidence admissible at an extradition hearing, whereas evidence that merely
 4 controverts the existence of probable cause, or raises a defense, is not admissible.”); *Hooker*
 5 *v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978) (a fugitive’s right to controvert the evidence
 6 introduced against him is “limited to testimony which explains rather than contradicts the
 7 demanding country’s proof” and he is “not permitted to introduce evidence on the issue of
 8 guilt or innocence”). This Court does not weigh conflicting evidence. *Quinn v. Robinson*,
 9 783 F.2d 776, 815 (9th Cir. 1986) (extradition magistrate “does not weigh conflicting
 10 evidence and make factual determinations but, rather, determines only whether there is
 11 competent evidence to support the belief that the accused has committed the charged
 12 offense”).

13 In short, the fugitive cannot raise affirmative defenses or raise other issues that require
 14 a trial. *See Desmond v. Eggers*, 18 F.2d 503, 505 (9th Cir. 1927) (“All of the authorities
 15 agree . . . that matters which are only a defense to a trial on the merits are not admissible”);
 16 *Extradition of Mainero*, 990 F. Supp. 1208, 1218 (S.D. Cal. 1997) (“Evidence that conflicts
 17 with that submitted on behalf of the demanding party is not permitted, nor is impeachment
 18 of the credibility of the demanding country’s witnesses.”). Rather, a fugitive must wait to
 19 raise those issues in the requesting country when he stands trial. *Barapind*, 400 F.3d at 749
 20 (“The court concluded, however, that ‘the credibility of Makhan Ram’s recantation cannot
 21 be determined without a trial,’ *Singh*, 170 F.Supp.2d at 1024, which would exceed the
 22 limited mandate of an extradition court in making a determination of probable cause, as
 23 opposed to ultimate guilt.”). *See also Matter of Sindona*, 450 F. Supp. 672, 685 (S.D.N.Y.
 24 1978), *aff’d*, 619 F.2d 167 (2nd Cir. 1980) (“The decisions are emphatic that the extraditee
 25 cannot be allowed to turn the extradition hearing into a full trial on the merits.”) (citing *In*
 26 *re Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883), as cited in *Collins*, 259 U.S. at 316, and

1 *Charlton*, 229 U.S. at 461). In *Matter of Sindona*, the New York court quoted *In re Wadge*,
 2 where the district court rejected the fugitive's argument that he should be given an extensive
 3 hearing in the extradition proceedings, because that would defeat the foreign government's
 4 rights under the treaty to obtain the fugitive for trial, "in plain contravention of the intent and
 5 meaning of the extradition treaties." *Matter of Sindona*, 450 F.Supp at 685 (quoting *In re*
 6 *Wadge*, 15 F. at 866).

7 Admission of evidence proffered by the fugitive at an extradition proceeding is left
 8 to the sound discretion of the court, guided by the principle that evidence of facts
 9 contradicting the demanding country's proof or establishing a defense may properly be
 10 excluded. *Hooker*, 573 F.2d at 1369 (citing *Charlton*, 229 U.S. at 456; *Shapiro v.*
 11 *Ferrandina*, 478 F.2d at 901); *see also United States ex rel Petrushansky v. Marasco*, 325
 12 F.2d 562, 567 (2nd Cir. 1963) (and cases cited therein). As explained below, some matters
 13 are clearly impermissible.

14 D. Impermissible Defenses

15 Defenses against extradition which "savor of technicality" should be rejected by a
 16 court as they are peculiarly inappropriate in dealings with a foreign nation. For example, a
 17 variance between the charges pending in the foreign state and the complaint filed on behalf
 18 of that state in our federal courts is not a defense to surrender. *Glucksman v. Henkel*, 221
 19 U.S. 508, 513-14 (1910); *see also Bingham*, 241 U.S. at 517; *United States ex rel. Bloomfield*
 20 *v. Gengler*, 507 F.2d 925, 927-1024 (2nd Cir. 1974); *Shapiro v. Ferrandina*, *supra*, 478 F.2d
 21 at 904; *In re Edmonson*, 352 F. Supp. 22, 24 (D. Minn. 1972).

22 1. *Conflicting evidence.*

23 The fugitive's grounds for opposing the extradition request are severely
 24 circumscribed. *Hooker*, 573 F.2d at 1368; *First National City Bank of New York v.*
 25 *Aristeguieta*, 287 F.2d 219, 222 (2nd Cir. 1960); *In Re Shapiro*, 352 F. Supp. 641, 645
 26 (S.D.N.Y. 1973). He may not introduce evidence which: 1) simply conflicts with the

evidence submitted on behalf of the demanding state, *Barapind*, 400 F.3d at 749; *Singh*, 170 F.Supp.2d at 994; *Mainero v. Gregg*, 164 F.3d 1199, 1205, 1207 n. 7 (9th Cir. 1999); *Collins*, 259 U.S. at 315-17; 2) establishes an alibi, *Abu Eain v. Adams*, 529 F.Supp 685 (N.D.Ill. 1980); 3) sets up an insanity defense, *Hooker v. Klein, supra*; or 4) impeaches the credibility of the demanding country's witnesses, *Barapind, supra*; *In re Locatelli*, 468 F.Supp. 568 (S.D.N.Y. 1979). The fugitive is limited to introducing evidence which "explains away" or "obliterates" probable cause. See Section II.C, above.

2. *Trial in requesting country on other charges.*

A fugitive's contention that he or she will be tried in the requesting country for crimes other than those for which extradition will be granted, or that surrender is being requested for political offenses, must be rejected as baseless, without merit, or beyond the responsibility of the court, because the United States Government does not presume that the requesting government will seek a trial in violation of a treaty. *Bingham*, 241 U.S. at 514. As the district court noted in *Gallina v. Fraser*, 177 F.Supp. 857, 867 (D.Conn. 1959): "the Secretary of State of the United States would not authorize the surrender of a fugitive . . . to be punished for non-extraditable crimes, and . . . any extradition would be so conditioned as to negate this possibility."

3. *Motivation of requesting country: rule of non-inquiry.*

This Court may not look behind the extradition request to the motives of the government of the demanding country. The Ninth Circuit has long adhered to the "Rule of Non-Inquiry," which provides that it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state. See *Barapind*, 225 F.3d at 1105-06 (noting acceptance of the general rule). "Undergirding this principle is the notion that courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and

1 pronouncements about the workings of foreign countries' justice systems. The State
 2 Department is in a superior position to consider the consequences of a nonextradition
 3 decision upon foreign relations than the courts and it has diplomatic tools, not available to
 4 the judiciary, which it can use to insure that the requesting state provides a fair trial." *Matter*
 5 *of Requested Extradition of Smyth*, 61 F.3d 711, 714 (9th Cir. 1995) (internal quotations and
 6 citation omitted). *See also In re Lincoln*, 228 Fed. 70, 74 (E.D.N.Y. 1915) ("It is not a part
 7 of the court proceedings nor of the hearing upon the charge of the crime to exercise
 8 discretion as to whether the criminal charge is a cloak for political action, nor whether the
 9 request is made in good faith. Such matters should be left to the Department of State . . .").

10 4. *U.S. constitutional protections not required in criminal proceedings abroad.*

11 An extraditing court will generally not inquire into the procedures or treatment that
 12 may await a surrendered fugitive in the requesting country. *Arnbjornsdottir-Mendler v.*
 13 *United States*, 721 F.2d 679, 683 (9th Cir. 1983), citing *Gallina v. Fraser*, 278 F.2d 77, 78
 14 (2d Cir. 1960); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971). *See*
 15 *also Holmes v. Laird*, 459 F.2d 1211, 1219 (D.C. Cir. 1972) ("a surrender of an American
 16 citizen by treaty for purposes of a foreign criminal proceeding is unimpaired by an absence
 17 in the foreign judicial system of safeguard in all respects equivalent to those constitutionally
 18 enjoined upon American trials"); *Ahmad v. Wigen*, 910 F.2d 1063, 1072-73 (2nd Cir. 1990)
 19 (citing *Sindona v. Grant*, 619 F.2d 167, 174 (2nd Cir. 1980); *Matter of Extradition of Tang*
 20 *Yee-Chun*, 674 F.Supp. 1058, 1068-69 (S.D.N.Y. 1987); *Neely*, 180 U.S. at 109; *Pfeifer v.*
 21 *United States Bureau of Prisons*, 468 F. Supp. 920 (S.D. Cal. 1979), *aff'd* 615 F.2d 873 (9th
 22 Cir. 1980). Another court has stated:

23 Regardless of what constitutional protections are given to persons held for trial
 24 in the courts of the United States or of the constituent states thereof, those
 25 protections cannot be claimed by an accused whose trial and conviction have
 26 been held or are to be held under the laws of another nation, acting according
 to its traditional processes and within the scope of its authority and
 jurisdiction.

1 *Gallina v. Fraser*, 177 F. Supp. 856, at 866 (D. Conn. 1959), *aff'd*, 278 F.2d 77 (2d Cir.
2 1960).

3 E. Extradition Treaties Are To Be Liberally Interpreted

4 Extradition treaties must be liberally construed to effect their purpose, namely, the
5 surrender of fugitives for trial for their alleged offenses. *Valentine v. United States ex rel.*
6 *Neidecker*, 299 U.S. 5, 14 (1936); *Factor v. Laubenheimer*, 290 U.S. 276, 293, 301 (1933).

7 In discussing the application of this rule, the Southern District of Florida stated:

8 [A] narrow and restricted construction is to be avoided as not consonant with
9 the principles deemed controlling in the interpretation of international
10 agreements. Considerations which should govern the diplomatic relations
11 between nations, and the good faith of treaties, as well, require that their
obligations should be liberally construed so as to effect the apparent intentions
of the parties to secure equality and reciprocity between them. [citations
omitted].

12 *McElvy*, 523 F. Supp. at 47. In order to carry out a treaty obligation, the treaty “should be
13 construed more liberally than a criminal statute or the technical requirements of criminal
14 procedure.” *Laubenheimer*, 290 U.S. at 298.

15 The United States does not expect foreign governments to be versed in our criminal
16 laws and procedures. *Grin v. Shine*, 187 U.S. 181, 184 (1902). Thus, “[f]orm is not to be
17 insisted upon beyond the requirements of safety and justice.” *Fernandez v. Phillips*, 268
18 U.S. 311, 312 (1925). This approach is mandated by the liberal rules of construction that are
19 to be used in interpreting extradition agreements.

20 Statements by the United States Department of State as to interpretation of treaties are
21 to be given great weight by our courts. *Sayne*, 418 F.2d at 684 (5th Cir. 1969); *In re Ryan*,
22 *supra*, 360 F.Supp. at 272 n.4; *In re Extradition of D'Amico*, 177 F. Supp. 648, 653 n.7
23 (S.D.N.Y. 1959), *appeal dismissed*, 286 F.2d 320 (2nd Cir. 1960).

24 F. Fugitive for Extradition Purposes

25 The nature of the fugitive’s absence from the country seeking his surrender is
26 immaterial; it is sufficient for purposes of extradition that he be found in the United States.

1 *Vardy v. United States*, 529 F.2d 404, 407, *reh. denied*, 533 F.2d 310 (5th Cir. 1976); *In Re*
 2 *Chan Kam-Shu*, *supra*, 477 F.2d at 338-339; *United States ex rel. Eatessami v. Marasco*, 275
 3 F. Supp. at 496.

4 CONCLUSION

5 Extradition is often characterized as of its own kind or class, i.e., *sui generis*. *See*,
 6 *e.g.*, *Hooker v. Klein*, 573 F.2d at 1369. Despite the unusual nature of the proceedings,
 7 extradition is regulated by a body of well-settled precedent, much of it originating with the
 8 Supreme Court. *Ahmad v. Wigen*, 910 F.2d at 1065. Although other elements must also be
 9 present, the primary issue of every extradition proceeding is whether there exists probable
 10 cause to believe that the fugitive has committed the crime charged in the requesting country.
 11 The latter determination is the kind that courts make in a preliminary hearing under
 12 Fed.R.Crim.P. 5.1. *Ward v. Rutherford*, 921 F.2d at 287. The extradition hearing must not
 13 be converted into a trial on the merits, and the rules of evidence and criminal procedure do
 14 not apply. The fugitive's opportunities to oppose the request are limited because his
 15 defenses will be aired in the requesting country.

16 Based on the information provided by Canada, including its identifying information
 17 of Rossman, there is probable cause to believe that he is extraditable to Canada.

18 Respectfully submitted this 11th day of April, 2013.

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24 Copy provided on this date to:

25 Ryan Moore, Esq.

26 Hon. D Thomas Ferraro, United States Magistrate Judge